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No. 79-1944

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

J. TRUETT PAYNE COMPANY, INC.
a corporation,

Petitioner,

v.

CHRYSLER MOTORS CORPORATION,
a corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION BY THE CESSNA AIRCRAFT COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE CESSNA AIRCRAFT COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, CHRYSLER MOTORS CORPORATION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals correctly held that the actual injury to competition required in a section 2(a) damage action cannot be presumed from the existence of a price difference.

2. Whether the Court of Appeals correctly held that the "amount of the price discrimination" cannot be used in a section 2(a) damage action as an automatic measure of damages resulting from the price discrimination.

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MOTION BY THE CESSNA AIRCRAFT COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, CHRYSLER MOTORS CORPORATION

The Cessna Aircraft Company ("Cessna") respectfully moves this Court for leave to file BRIEF OF THE CESSNA AIRCRAFT COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, CHRYSLER MOTORS CORPORATION, instanter. The grounds for Cessna's motion are stated below pursuant to Rule 36 of the Rules of the Supreme Court.

I. Petitioner Has Refused to Consent

Pursuant to Rule 36 of the Rules of the Supreme Court, Cessna requested petitioner, J. Truett Payne Company, Inc. ("Payne"), and respondent, Chrysler Motors Corporation ("Chrysler"), to consent to the filing of an *amicus curiae* brief by Cessna in support of respondent Chrysler. Petitioner Payne refused to consent. Respondent Chrysler consented.

II. Interest of The Cessna Aircraft Company

Cessna is interested in this case because Cessna is a defendant in class action litigation alleging price discrimination which involves certain legal issues similar to those involved in the case at bar. Specifically, Cessna is a defendant in two actions consolidated by the Judicial Panel for Multidistrict Litigation in the Western District of Missouri, Western Division, as *In re Cessna Aircraft Distributorship Antitrust Litigation,* M.D.L. 123. The principal allegation in this litigation relates to Cessna's "dual" distribution system during the relevant period. In certain areas of the country, Cessna sold aircraft through its own zone offices to contracted retail dealers ("zone dealers"). In other areas of the country, Cessna sold aircraft to independent wholesale distributors who, in turn, sold to dealers. Plaintiff, a zone dealer, alleges that certain independent distributors sometimes sold aircraft directly to retail customers, rendering the wholesaler's discount they received from Cessna discriminatory. Insofar as Cessna can presently determine, plaintiffs allege approximately 3,100 such "favored" aircraft sales to some 15 distributors and seek damages based on approximately 20,000 sales to the approximately 1,500 class member dealers. These allegations involve aircraft of widely differing types ranging in price from $7,000 to $250,000. In all, plaintiff claims damages to class members calculated on an "automatic" damage theory of approximately $37 million, trebled to approximately $111 million.

On June 5, 1974, the Hon. William H. Becker, United States District Judge, certified this litigation to proceed as a class action. That class action ruling was predicated, in part, on the District Court's acceptance of plaintiff's assertions that

FTC v. *Morton Salt Co.*, 334 U.S. 37 (1948), allowed an inference of injury to competition under section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a), and of injury to the business or property of class members under section 4 of the Clayton Act, 15 U.S.C. § 15, and, further, that damages could be determined based on the "amount of discrimination," thus dispensing with the need for individual proof with regard to each class member. It is Cessna's position that such "inferences" are erroneous as a matter of law.

In the case at bar, Payne and two *amici curiae* in support of Payne, Vanco Beverage, Inc. ("Vanco") and Ricky Hasbrouck, et al. ("Hasbrouck"),* have explicitly urged this court to hold that the requirement of injury to plaintiff's business set forth in section 4 may be "inferred" once price discrimination is proven. They have also urged the Court to hold that the "amount of the price discrimination" may be used as an automatic measure of damages. In the context of the case at bar, there is also a third implicit request: namely, that this Court allow proof of price discrimination to give rise to a presumption of the "substantial lessening of competition" required by section 2(a). As described below, this request is inherent in Payne's argument because the Court of Appeals for the Fifth Circuit explicitly held that Payne failed to prove the requisite injury to competition. Thus, unless this Court is willing to create a presumption of injury to competition, the Fifth Circuit's decision must be affirmed. Cessna submits that each of these three legal issues is potentially significant to the issues of antitrust injury, damages, and the propriety of class certification in the Cessna litigation—and is of potential importance in other Robinson-Patman litigation involving class allegations.

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* The Court has previously granted leave for Vanco and Hasbrouck to each file a brief *amicus curiae* in support of petitioner, Payne.

III. Questions of Law that Have Not Been Adequately Presented and their Relevancy to the Disposition of this Case.

The briefs filed by Payne, Vanco, and Hasbrouck all fail to squarely address a critical holding of the United States Court of Appeals for the Fifth Circuit in *Chrysler Credit Corp.* v. *J. Truett Payne, Inc.*, 607 F.2d 1133 (1979), reh. en banc den. 611 F.2d 882 (January 18, 1980), 614 F.2d 1298, 1299 (March 18, 1980). The Fifth Circuit expressly held that Payne failed to prove the substantial injury to competition required by section 2(a):

> *"When a seller charges different prices to different purchasers, as alleged here, injury to competition does not necessarily result.* Both the statute and the Courts recognize this. 15 U.S.C. § 13(a).... Competition is harmed only to the extent that the favored purchaser, by use of the discriminatory price difference, actually draws sales or profits from his unfavored competition.... As discussed above, *there is no evidence, much less substantial evidence, that such was the case here. Id.* at 1136 (citations omitted; emphasis added).

Moreover, the Fifth Circuit explicitly rejected Payne's claim that *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), allows any inference or presumption of the requisite injury to competition in a private action for damages. The Fifth Circuit held that:

> "In order to recover damages, Payne had to show *more than just a threat of* antitrust injury. As discussed above, it failed to do so." *Id.* at 1136-37 (emphasis added).

Despite this clear holding, petitioner Payne and amici Vanco and Hasbrouck each address this Court as if there were no issue regarding proof of the requisite substantial injury to competition.

Payne's erroneous statement of the Fifth Circuit's holding obscures the potentially broad ramifications which the case at bar carries for private damage actions under section 2(a).

Although Payne and its supporting amici do not acknowledge it, they are necessarily asking this Court to do nothing less than discard the clear statutory mandate that limits liability in private damage actions under section 2(a) to those price discriminations which a plaintiff proves have caused actual substantial injury to competition resulting in antitrust injury to plaintiff's own business; *i.e.*, situations where a plaintiff has suffered business injury flowing from the proven injury to competition. Implicitly, Payne and its amici would have this Court transform price discrimination into a *per se* antitrust violation—comparable to price fixing—in which the price discrimination itself is *presumed* to cause the requisite injury to competition. Cessna respectfully suggests that such an important issue should not be decided implicitly.

As a defendant in section 2(a) litigation certified as a class action, Cessna is interested in a correct resolution of the issues that arise in this case. In addition, as a defendant in a class action context, Cessna can offer a unique perspective on the potential significance of the issues involved in the case at bar. Because this Court's opinion may have a profound influence on the interpretation of the elements of section 2(a) liability in private damage actions, it is important that the Court be presented with the fullest possible view of the issues.

Respectfully submitted,

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STATEMENT OF INTEREST AND QUESTIONS PRESENTED

The Cessna Aircraft Company ("Cessna") incorporates by reference the Statement of Interest and Questions of Law That Have Not Been Adequately Presented and their Relevancy to the Disposition of this Case set forth in paragraphs II and III, respectively, of Cessna's MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE which immediately precedes and is bound together with this Brief.

SUMMARY OF THE ARGUMENT

The Fifth Circuit's decision in the case at bar, *Chrysler Credit Corp.* v. *J. Truett Payne, Inc.*, 607 F.2d 1133 (5th Cir. 1979), reh. en banc den., 611 F.2d 882 (January 18, 1980), 614

F.2d 1298, 1299 (March 18, 1980), held that petitioner, J. Truett Payne Company, Inc. (hereinafter "Payne"), had to prove *actual* antitrust injury to establish damage liability for price discrimination and that Payne failed to meet that burden of proof. Both the Court of Appeals' holding that *actual* antitrust injury must be proven and its conclusion that Payne failed to prove such injury are correct and should be affirmed.

A plaintiff in a private damage action must prove injury to establish liability for price discrimination. The requisite showing of injury has two statutory sources. First, under section 4 of the Clayton Act, 15 U.S.C. § 15, a private plaintiff must prove that it suffered *actual* injury to its business. As this Court held in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), however, only *antitrust* injury satisfies the injury requirement of section 4. The definition of what constitutes "antitrust injury" must necessarily be drawn from the relevant antitrust statute itself. Thus, the second statutory source for defining the requisite injury is section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a). The type of antitrust injury that section 2(a) is intended to forestall is a "substantial lessening of competition." Hence, reading the two statutory requirements together, as mandated by *Brunswick*, it is clear that a private plaintiff seeking damages under section 2(a) must prove that plaintiff suffered business injury flowing from an *actual* substantial lessening of competition caused by the price discrimination. No lesser showing would suffice.

In the case at bar, the Fifth Circuit held that Payne failed to prove antitrust injury. Neither Payne nor the *amici* supporting Payne acknowledge that fact. Instead, they rely on the assertion that the requisite injury to competition may be "inferred" under the authority of *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948). They then proceed to their arguments regarding section 4 and "automatic damages" as if lack of proof of injury to competition were no obstacle to their success. Indeed, Payne casts its argument as though actual injury to competition had been established and as though it is only asking the court to permit an inference that Payne itself

suffered injury as a result. Such is not the case. The assertion that antitrust injury can be inferred was squarely rejected by the Fifth Circuit and is in conflict with this Court's teaching in *Brunswick*. Neither *Morton Salt* nor any other authority permits an "inference" of *actual* substantial injury to competition, which is the prerequisite for damage liability.

In the context of the case at bar, what Payne really asks this Court to do is to create a series of totally unprecedented presumptions regarding antitrust injury and damages which would be triggered by a simple showing of a price difference.* For Payne to prevail, this Court would have to agree that mere proof of a price difference would give rise to two bootstrapped presumptions. First, that proof of a price difference would itself give rise to a presumption of actual injury to competition. Second, that proof of a price difference would itself give rise to a presumption of *antitrust* injury to the disfavored purchaser's business. In sum, Payne cannot prevail unless this Court is willing to transform price discrimination into a *per se* antitrust violation comparable to price-fixing—*i.e.*, to presume that anticompetitive effects are inherent in a price difference itself. Cessna submits that any such transformation would not only violate the clear intent of Congress, but would work extreme injustices in the marketplace.

In addition to presumption of injury, Payne also contends that proof of a price difference should give rise to a presumption that the amount of the price difference constitutes the amount of the damages actually suffered by plaintiff. That contention is entirely dependent upon the presumption of injury; it necessarily fails when the underlying assertion of "inferred" injury to competition fails. Where a plaintiff is able to prove that a price difference actually injured competition, the adverse competitive effect proven will suggest the appropriate measure of damages. The appropriate measure of

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* Under section 2(a), a price "discrimination" is simply a price "difference" and has no pejorative character unless all the elements of section 2(a) are involved. *FTC* v. *Anheuser-Busch, Inc.* 363 U.S. 536, 549 (1960).

damages need not bear any resemblence to "the amount of the price discrimination."

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT A PLAINTIFF SEEKING DAMAGES UNDER SECTION 2(a) MUST PROVE AN ACTUAL INJURY TO COMPETITION; SUCH INJURY CANNOT BE "INFERRED" FROM THE EXISTENCE OF A PRICE DIFFERENCE.

A. The Fifth Circuit Held that Payne Failed to Show Antitrust Injury.

The Fifth Circuit explicitly held that Payne failed to prove that it suffered antitrust injury; *i.e.*, failed to prove that the alleged price discrimination caused the requisite substantial injury to competition and that Payne was injured as a consequence of such lessening of competition. Citing the teaching of *Brunswick*, the Court of Appeals stated in pertinent part:

> "[T]he antitrust laws do not provide a damages remedy for all losses traceable to conduct violating the antitrust laws, only for losses that are part of the anticompetitive effect of such conduct. *When a seller charges different prices to different purchasers, as alleged here, injury to competition does not necessarily result.* Both the statute and the courts recognize this. 15 U.S.C. § 13(a). . . . Competition is harmed only to the extent that the favored purchaser, by use of the discriminatory price difference, actually draws sales or profits from his unfavored competitor. . . . As discussed above, *there is no evidence, much less substantial evidence, that such was the case here.*" 607 F.2d 1136 (citations omitted; emphasis added).

Moreover, the Fifth Circuit explicitly rejected Payne's reliance on *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948), for the

proposition that the requisite substantial injury to competition could be "inferred" from proof of price discrimination itself. The Fifth Circuit held:

> "Payne's reliance on *FTC* v. *Morton Salt Co.* and its progeny is misplaced. . . . [T]he showing necessary to establish a section 2(a) violation is not the same as the showing necessary to support a private action for damages. . . . *What Morton Salt found inferable from a substantial price difference was a threat to competition* sufficient to violate the statute. Even assuming that *Morton Salt* is still viable, it is of no help to Payne. In order *to recover damages, Payne had to show more than just a threat* of antitrust injury. . . . [I]t failed to do so." 607 F.2d at 1136-37 (citations omitted; emphasis added).

Remarkably, Payne and the *amici* supporting Payne fail to squarely address this dispositive aspect of the Court of Appeals' holding. Indeed, if one were to read only their briefs, one might easily come away with the serious misperception that no issue existed regarding the sufficiency of Payne's showing of the requisite injury to competition.* To the contrary, the Court of Appeals found there was such an issue and decided it correctly against Payne.

B. A Plaintiff Seeking Damages Must Prove an Actual Substantial Lessening of Competition.

In *Brunswick*, this Court held that section 4 only permits recovery of treble damages for "antitrust injury." Antitrust injury means, in part, injury that flows from the actual

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* Payne's brief discusses the Fifth Circuit's holding as though it rested only on section 4 of the Clayton Act. Payne's Brief, at 11, cites the Court of Appeals' opinion for the proposition that it is a section 4 issue. The page in the opinion which Payne cites (607 F.2d at 1136) is the page where the Fifth Circuit explicitly holds that Payne failed to prove injury to competition under "15 U.S.C. § 13(a)."

The brief *amicus curiae* filed by Vanco Beverage, Inc., not only fails to squarely address the Fifth Circuit's holding but also states that "a demonstration of likelihood of competitive injury" is "an element of the offense which the Fifth Circuit assumed to have been established." Vanco Brief at 13, n. 2. What Vanco omits to say is that the Fifth Circuit held a mere "likelihood" of such injury to be insufficient to support a damage claim.

adverse economic consequences of various practices which the antitrust laws were intended to forestall. 429 U.S. at 487-88. Hence, a proper definition of "antitrust injury" requires the intermeshing of the remedial statutory provisions of section 4 with the substance of the antitrust injury addressed by the various antitrust statutes. 429 U.S. at 486. The type of injury which section 2(a) was intended to prevent is the diminution of competition. 15 U.S.C. § 13(a). Thus, in order for injury to flow from a diminution of competition, there must first be an *actual* diminution of competition resulting from a price discrimination.

Without squarely addressing the implications of *Brunswick* for determining the boundaries of "antitrust injury," Payne asks this Court to allow the requisite showing of injury to competition to be "inferred" from proof of a price difference:

> "The plaintiff in a private price discrimination action must only prove sufficient price discrimination from which a jury can infer injury to competition. This inference of injury to competition is regularly permitted in public cases enforcing § 2(a) of the Robinson-Patman Act. *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948). An injury to competition is inferred where there is substantial price discrimination, keen competition, or where the price discrimination is reflected in the retail price. When a plaintiff shows injury to competition, he simultaneously shows injury to his business or property for purposes of recovering damages under § 4 of the Clayton Act." (Payne Brief at 9.)

As discussed below, Payne's reliance on *Morton Salt* is misplaced.

C. *Morton Salt* Provides No Authority for "Inferring" Actual Competitive Injury in a Damage Action.

Even if *Morton Salt* might provide authority for inferring a *probability* of a substantial lessening of competition sufficient for injunctive relief, it has no applicability to a damage

action. A mere showing of a threat to competition is insufficient proof of actual antitrust injury to establish liability in a private damage action.

The context in which *Morton Salt* arose demonstrates its inapplicability to private damage actions. After the Federal Trade Commission had held an administrative hearing in which it concluded that the price differential in question posed a threat of a lessening of competition, the Commission issued a cease and desist order to forestall injury to competition. When that order was set aside by the Court of Appeals, this Court granted certiorari. 334 U.S. at 39-40. It was in this injunctive context that this Court stated that the Commission need not find actual injury to competition to support its order, "but only that there is a reasonable possibility" that such injury may occur. *Id.* at 46. Of course, the actual injury requirement for damage liability under section 4 was not involved in *Morton Salt*.

Moreover, in reaching its finding of potential injury to competition, the Commission considered a variety of information regarding the commercial context in which the difference in price occurred. In all, the Commission received two thousand pages of testimony largely devoted to the issue of injury to competition. *Id.* at 50. This is the setting of the so called "inference" of injury upon which Payne would rely. This Court did not accept a perfunctory conclusion in *Morton Salt*. Rather, it accorded substantial weight to the Commission's consideration of the totality of the evidence and to the Commission's exercise of the expertise committed to it as "a body of experts" in drawing conclusions from the specific facts presented. *Id.* at 54. No such considerations apply to private damage actions.

D. The Incipient Competitive Injury Standard of Section 2(a) Is Insufficient for Damage Liability.

The Commission's purported use of an "inference" of a probability of a lessening of competition *in futuro* has no relevance to a damage action. Under the teaching of *Brunswick*, satisfaction of the "incipiency" standard of section 2(a) is insufficient to show the *actual* antitrust injury required for

damage actions brought under section 4. Speaking in *Brunswick* of the probable lessening of competition standard of section 7 of the Clayton Act, 15 U.S.C. §18—a standard which is virtually identical to the language of section 2(a)—this Court stated that mere proof of an incipient injury is insufficient to allow liability for damages:

> "Plainly, to recover damages respondents must prove more than that petitioner violated § 7 since such proof establishes only that injury may result." 429 U.S. at 486.

Moreover, the analysis underlying *Brunswick* makes it clear that proof of only a probability of substantial competitive injury—*i.e.*, the incipient injury standard of section 2(a)— cannot suffice for the proof of actual injury to competition required in light of section 4. Since the claimed injury to plaintiff's business must *flow from* and *be of the same type as* the injury intended to be forestalled, 429 U.S. at 477, it necessarily follows that a private plaintiff seeking damages must prove that there was an *actual* substantial lessening of competition and that the plaintiff was one of the competitors whose competitive position was *actually* injured. Clearly an *actual* injury to the plaintiff cannot flow from and be of the same type as a merely *potential* injury to competition. If there was no *actual* injury to competition, then the injury claimed by plaintiff necessarily flows from some other cause.

The Fifth Circuit clearly made the same analysis and reached the same conclusion. Reasoning from *Brunswick*, the Fifth Circuit concluded that, although proving a price discrimination "which threatens competition but which has not caused any actual competitive injury" may be sufficient to show a "violation" of the statute, it is not sufficient to support an action for damages. The Court of Appeals concluded that, "In order to recover damages, Payne had to show *more than just a threat* of antitrust injury." 607 F.2d at 1136-1137 (emphasis added).

Similarly, in *Carlson Companies, Inc.* v. *Sperry & Hutchinson Co.*, 507 F.2d 959, 961-962 (8th Cir. 1974), a pre-*Brunswick* decision, the Eighth Circuit concluded that a potential injury

to competition under the incipiency standard of section 7, even though sufficient to create an antitrust violation for injunctive purposes, does not suffice for a damage action under section 4. *See also John Lenore & Co.* v. *Olympia Brewing Co.*, 550 F.2d 495, 499 (9th Cir. 1977).

E. A Section 2(a) Plaintiff Must Prove Actual Antitrust Injury by Probative, Competent Evidence.

Because an *actual* competitive injury must be proven, a plaintiff seeking damages under section 2(a) must produce competent evidence showing that the alleged price discrimination had an actual adverse impact on competition. As the Fifth Circuit correctly observes, the most obvious types of evidence that could show actual competitive injury would be evidence that the favored competitor actually used his price advantage to divert a substantial volume of sales from the disfavored competitor or evidence of a substantial decline in the disfavored competitor's profitability resulting from his lowering of prices to meet the favored competitor's lowered prices. In any event, there must be evidence showing that the favored competitor *actually used* the discriminatory discount to the detriment of competition with disfavored competitors.* 607 F.2d at 1136. *See also Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 478 F. Supp. 243, 273-76 (E.D. Pa. 1979), aff'd,___ F.2d ___, 1980-1 Trade Cases (CCH) ¶63,611 at 77,237n. 6 (3rd Cir. 1980); *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F.2d 457, 460 (2nd Cir. 1957).

Insofar as the evidence in the case at bar is set forth in Payne's brief, it does not appear that Payne offered any substantial evidence of an adverse effect on his sales or profits. The market share data Payne recites reflects only apparently

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* Payne suggests that a customer who pays a lower price *might* use the price difference to strengthen its competitive position indirectly. Payne Brief at 28. Absent evidence that any such use of the price difference actually occurred and had some competitive effect, this suggestion is pure conjecture and does not show any actual injury to competition or even to any competitor. See *Dole Valve Co.* v. *Perfection Bar Equipment, Inc.*, 311 F. Supp. 459, 462 (N.D.Ill. 1970).

minor fluctuations from year to year. Payne Brief at 26. Moreover, the Fifth Circuit explicitly rejected Payne's contention that these fluctuations were caused by Chrysler's incentive programs. 607 F.2d at 1135 n.3, 136 n.5. And finally, Payne's evidence regarding new car net profit margins shows that Payne's margins were the highest of his competitors in 1973 and somewhere in the mid-range in other years. Payne Brief at 16 n.7. This evidence clearly shows no actual substantial adverse impact on competition.

F. Since Price-Discrimination Is Not a *Per Se* Violation, Actual Competitive Injury May Not Be Presumed.

Although Payne repeatedly refers to an "inference" of competitive injury from mere evidence of a price difference, Payne really asks this Court to create a *presumption* of actual competitive injury.* Such a presumption would transform price discrimination into a *per se* antitrust violation in which

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* The types of evidence which Payne offers to serve as premises for an "inference" of injury to competition are "substantial price discrimination, keen competition, or where the price discrimination is reflected in the retail price." Payne Brief at 9. (Cessna is unable to locate even a purported showing of the last factor in Payne's brief.) Mere statements that such factors exist are hardly sufficient to show that the alleged price discrimination had any actual anticompetitive effect. As this Court cautioned in *FTC* v. *Sun Oil Company*, 371 U.S. 505, 527 n.15 (1963): "Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis." Since Payne does not make any such analysis, nothing short of a presumption of competitive harm will allow Payne to prevail. Cf. *Fowler Manufacturing Co.* v. *Gorlick*, 415 F.2d 1248, 1253 (1969) (the district court treated keen competition only as a basis for "assuming" a competitive injury).

Payne also argues two inconsistent theories of competitive injury. Payne begins by asserting that the price differences must have had a competitive impact because the marketplace was characterized by "keen competition" and "fairly small" profit margins. Payne Brief at 9. Later, however, Payne asserts that retail prices were "slightly higher" than they otherwise would have been because of the price differences. *Id.* at 21. "Higher" than normal prices should not occur in a market of "keen" competition. The fact that Payne attempts to "infer" the same injury from opposing factual premises underscores that Payne is really seeking a presumption of competitive injury.

competitive injury is treated as being inherent in the price difference itself.

Such a transformation would be contrary to the statutory provisions of section 2(a). On its face, the statutory language of section 2(a) clearly indicates a Congressional intent to limit the reach of the statute to those price differences that actually have the proscribed adverse effect on competition.* Indeed, the competitive injury requirement is the key to reconciling section 2(a) "with the broader antitrust policies laid down by Congress." *Automatic Canteen Company of America* v. *FTC*, 346 U.S. 61, 74 (1953). A statutory limitation of this type is completely inconsistent with *per se* treatment. See *Brown Shoe Company* v. *United States*, 370 U.S. 294, 319 (1962) (stating that section 7 of the Clayton Act, which contains a virtually identical competitive injury standard of a probability of a substantial lessening of competition, was not meant to apply to every merger but only those having the requisite, anticompetitive effects); *Carlson Companies, Inc.* v. *Sperry & Hutchinson Co.*, 507 F.2d 959, 960 n.2, 961 (8th Cir. 1974).

As this Court recognized in *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958), only those types of antitrust violations which have inherently pernicious anticompetitive effects are appropriate for *per se* treatment in which competitive injury is presumed. This Court recently reaffirmed that *per se* treatment is to be the exception rather than the rule in antitrust analysis. *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 50, 58-59 (1977). Unlike those antitrust violations that have been singled out for *per se* treatment, price discrimination carries no inherent pernicious effect on competition. Depending on the market situation and the actual use, if any, to which a favored competitor puts a discount, price discrimination may or may not have any competitive significance; it may even be procompetitive. *See*

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* Compare sections 2(c), 2(d), and 2(e) of the Clayton Act, 15 U.S.C. §§ 13(c), (d), (e), which prohibit certain discriminatory practices without regard to lessening competition.

United States Department of Justice, Report on the Robinson-Patman Act (hereinafter "Department of Justice Report") at 47-58 (1976).

In addition, unlike the *per se* violation of price fixing, price discrimination has no necessary relationship to a normal, prevailing market price. With regard to price fixing, it is reasonable to assume that the effect will ultimately be to raise prices to some higher than competitive level. Hence, price fixing can normally be presumed to be an "overcharge" situation. By contrast, a price difference may simply provide a favored purchaser with a *lower* price than other purchasers from the same seller. In that situation there is no "overcharge" comparable to the higher than competitive price resulting from price fixing; there has only been an "undercharge" to the favored buyer. *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743, 746 (1947); *Edward J. Sweeney & Sons* v. *Texaco, Inc.*, 478F. Supp. 243,274-75 (E.D. Pa. 1979), aff'd, ____ F.2d ____, 1980-1 Trade Cases ¶63,611 at 77,237n.6 (3rd Cir. 1980). Whether such an undercharge has any competitive effect at all depends on such factors as the market structure, the supply/demand situation, and what, if anything, the favored buyer does with the price difference. *Per se* treatment is entirely inappropriate to section 2(a). *See Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 63 (1953) (the Robinson-Patman Act could "give rise to a price uniformity and rigidity in open conflict with the purposes of the antitrust legislation"); Department of Justice Report, supra, at 8-100, 209-249 (1976) (the Robinson-Patman Act itself has certain anticompetitive effects).

G. Neither *Illinois Brick* Nor *Hanover Shoe* Eliminates the Requirement of Proof of Actual Injury to Competition.

Payne suggests that *Illinois Brick Co.* v. *State of Illinois*, 431 U.S. 720 (1977), and *Hanover Shoe, Inc.*, v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968), create some broad and pervasive prohibition against requiring proof of the actual anticompetitive use of a discount. Payne Brief at 10, 11, 18, 28, 33, 34, 35, 36, and 39. Neither case supports any such

application. Both of those cases address different issues, arising in different contexts, and resting upon different considerations than the case at bar.

The simple answer to Payne's contention regarding *Hanover Shoe* is that Justice White's opinion, at the end of the section relating to the "passing-on" defense, explicitly recognizes that "establishing damages might require a showing of loss of profits to the buyer" in Robinson-Patman price discrimination cases. 392 U.S. at 494 & n.10 (citing *American Can Co.* v. *Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951), which found inadequate evidence of competitive injury). The reason for this recognition is readily apparent if the nature of the violation in *Hanover Shoe* is considered. *Hanover Shoe* involved a monopolization offense under section 2 of the Sherman Act—a *per se* violation in which competitive injury is presumed. The analysis in *Hanover Shoe,* and the cases cited by the Court, apply to monopolization and price fixing, two *per se* violations in which competitive injury is treated as being inherent. 392 U.S. at 483, 489-90.

This *per se* context carries significant implications for the "intermeshing" of section 4 with the substantive antitrust offense as required by *Brunswick.* In the context of *per se* Sherman Act offenses, there is no open issue regarding whether there was an injury to competition. Thus, the issue in *Hanover Shoe* was not *whether* there was a competitive injury, but rather *who* could prosecute a claim upon it under section 4, the direct purchaser or a subsequent customer who received a "passed-on" overcharge. By contrast, since no competive injury may be presumed in a section 2(a) price discrimination action, competitive injury remains a substantive element of liability which plaintiff must prove.

Moreover, in light of the *per se* nature of the offense in *Hanover Shoe,* the Court refused to allow the "passing-on" defense because of the threat that "those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who

would bring suit against them." *Id.* at 494. These considerations are inapplicable to secondary-line price discrimination claims. To begin with, a defendant seller such as Chrysler (or Cessna) does not receive the "fruits" of the alleged violation—the allegedly favored purchaser does. Second, secondary-line price discrimination cases do not create any threat of the absence of a viable plaintiff as discussed in *Hanover Shoe.*

In *Illinois Brick*, this Court reaffirmed its holding in *Hanover Shoe.* To prevent the possibility of multiple liability, the Court held that indirect purchasers are not permitted to seek treble damages under section 4. 431 U.S. at 730-31. In addition, the Court found that private enforcement of the antitrust laws is better served by treating the direct purchaser as if it were injured to the full extent of the antitrust injury. *Id.* at 745-747. Because *Illinois Brick* follows the *Hanover Shoe* analysis, it is inapplicable to the issue of competitive injury in section 2(a) cases for the same reasons set out above. The multiple recovery problem discussed in *Illinois Brick* has no application to proof of antitrust injury in secondary-line price discrimination cases.*

Finally, it should be noted that the discussion in both cases regarding the difficulty of tracing damages through various levels of distribution in suits by indirect purchasers is inapplicable to proof of the use of a discount by a favored customer required for section 2(a) liability. A section 2(a) plaintiff does not have to trace price changes *through* different distributive levels; he only has to show that the favored competitor lowered prices because of the price advantage and that, as a result, the plaintiff lost sales or profits. Similar proof has been found to be entirely workable in a variety of different types of commercial litigation.**

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* As in price-fixing cases, the proper plaintiff in a secondary-line price discrimination action under section 2(a) is the disfavored *direct* purchaser.

** Similar proof of resulting lost sales or lost profits is utilized in predatory pricing and refusal to deal cases under the Sherman Act. *E.g., Eastman Kodak Co.* v. *Southern Photo Co.*, 273 U.S. 359, 376-378 (1927).

II. THE FIFTH CIRCUIT CORRECTLY HELD THAT "THE AMOUNT OF THE PRICE DISCRIMINATION" MAY NOT BE TAKEN AS THE AMOUNT OF DAMAGES.

Payne's contention that "the amount of the price discrimination" can be used as a surrogate for the actual amount of damages is inseparably dependent upon Payne's contention that the requisite competitive injury can be presumed from the mere fact of a price difference.* Once it is recognized that a price difference creates no automatic injury to competition, it is axiomatic that a price difference does not create any automatic amount of injury. Hence, all of the arguments against presuming the requisite injury to competition apply with equal force against presuming the amount of injury. The latter presumption cannot exist in the absence of the former.** The Fifth Circuit was eminently correct when it

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* In *Fowler Manufacturing Company* v. *Gorlick*, 415 F.2d 1248 (1969), a case relied upon heavily by Payne, the conclusion that "automatic damages" are appropriate rests on the premise that there need not even be an "assumption" that competitive injury occurred. *Id.* at 1253. Thus, *Fowler* clearly treats section 2(a) as though price discrimination were intended to be a *per se* offense with a threshold for damage liability as low or even lower than that for Sherman Act offenses. *Id.* at 1251, 1252 & n.2.

** Payne and *amici* Vanco and Hasbrouck all contend that this Court approved automatic damages in the amount of the difference in prices by the language appearing in *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743, 757 (1947). It is somewhat surprising to find Payne elevating what has been regarded as dicta for 33 years into a holding of the Court. That position is untenable. The only issue decided by the Court in *Bruce's Juices* was whether a purchaser can refuse to pay for goods received simply because he alleges that the price charged by the buyer was discriminatory relative to some other sale. See Learned Hand's discussion of the limited significance of the same language in *Bruce's Juices* relied upon by Payne in *Enterprise Industries, Inc.* v. *Texas Co.*, 240 F.2d 457, 459-460 (2nd Cir), cert. denied, 353 U.S. 965 (1957).

Moreover, the record in *Bruce's Juices* was "unsatisfactory" by the Court's own characterization. 330 U.S. at 746. As a result of "the uncertain nature of the proceedings below," the majority was forced to

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concluded that "There is no necessary correlation [between a calculation of the amount of price discrimination and the amount of injury to the business of a disfavored buyer]."* 607 F.2d at 1137. The Department of Justice has also concluded that a resort to "automatic damages" under section 2(a) is inappropriate. *See* Department of Justice Report, *supra,* at 34-35, 44-45 (1976).

A prime example of the lack of correlation between the amount of a price difference and any damages actually incurred is found in *Sano Petroleum Corp.* v. *American Oil Co.,* 187 F.Supp. 345 (E.D.N.Y. 1960). In that case, the plaintiff argued that the proper measure of damages was "the difference in price to it and another buyer multiplied by the number of [units] *bought by* [plaintiff]." *Id.* at 357. The plaintiff had purchased 5,200,379 gallons of gasoline at a one-half cent per gallon higher price than its competitor paid for 239,440 gallons. As a result, the plaintiff claimed damages of

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"assume, but ... not decide" that Bruce's Juices could make out a section 2(a) claim. *Id.* at 747. The recitation of this assumption follows the Court's observation that "Bruce is not complaining of the high price of cans. Bruce complains of a lower price for cans to others—which would enable competitors to put their products on the market cheaper." *Id.* at 746. Thus, it is clear that the Court was not considering "the amount of the overcharge" in the sense that Payne and its amici use the term. See Payne Brief at 29.

Rather, one can only read the *Bruce's Juices* language relied upon by Payne as resting on an *assumption* that Bruce would somehow successfully prove a competitive injury resulting in actual damages amounting to the same amount as the price difference. Such a hypothetical setting cannot be said to have created a principle of law on an issue not before the Court. In fact, the $60,000 judgment subsequently awarded Bruce by the trial court does not appear to have resulted from a computation of the "amount of the discrimination." See *Bruce's Juices* v. *American Can Co.,* 87 F. Supp. 985, 993-94 (S.D. Fla. 1949). Cessna respectfully submits that the Court should take this occasion to clarify that reliance on *Bruce's Juices* as authority for the creation of an automatic damage rule is misplaced.

* *Amicus* Vanco Beverage, Inc. concedes there is no particular correlation between the discount given to competitiors and the amount of damages a disfavored customer suffers. *See* Vanco Brief at 16-18.

$26,002 although the favored purchaser had only been advantaged by a total of $1,297. *Id.* at 357. Clearly, when there is an imbalance in the number of favored and disfavored purchases, the automatic damage approach leads to damage claims that have no connection at all with reality.

Similarly, the class action litigation presently faced by Cessna dramatically demonstrates the absence of any relationship between the alleged "amount of discrimination" and any conceivably plausible estimate of the amount of any actual damages in a multiple purchaser setting.* In the Cessna litigation, plaintiff presently claims that there were approximately 3,100 "favored" aircraft sales to distributors and approximately 20,000 "disfavored" sales to class members. Claiming that the "amount of discrimination" equals the difference between the prices class members actually paid for aircraft and the hypothetical amount the class members would have paid if they had received a wholesaler's discount, plaintiff estimates that the aggregate sum of the "amount of discrimination" for the entire class is approximately $37 million—$111 million after trebling. The "amount of discrimination" claimed by plaintiff has no relationship to any conceivable damages actually suffered by the class. It is a classic example of a misplaced "overcharge" analysis run wild.**

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* A number of lawsuits raising section 2(a) claims have been found to be unsuited to class treatment because of the inherently individual nature of proof of injury and damages, among other factors. E.g., *Kelley* v. *General Motors Corp.*, 425 F. Supp. 13 (E.D. Pa. 1976); *Chmieleski* v. *City Products Corp.*, 71 F.R.D. 118 (W.D. Mo. 1976); *Boro Hall* v. *Metropolitan Tobacco Co.*, 74 F.R.D. 142 (E.D. N.Y. 1977); *Shaw* v. *Mobil Oil Corp.*, 60 F.R.D. 566 (D.N.H. 1973); *Hettinger* v. *Glass Specialty Co.*, 59 F.R.D. 286 (N.D. Ill. 1973); *Bel Air Markets* v. *Foremost Dairies, Inc.*, 55 F.R.D. 538 (N.D. Cal. 1972); *Van-S Aviation Corp* v. *Louisiana Aircraft, Inc.*, 1976-1 Trade Cases ¶ 60,759 (S.D. Fla., 1974).

** Relatively few Robinson-Patman damage cases have been litigated to a judgment for damages. Of those that have, the handful which have adopted the so-called "automatic damages rule" have done so in relatively simple market situations involving small dollar amounts. *E.g., Fowler Manufacturing Co.* v. *Gorlick*, 415 F.2d 1248, 1250, 1252 (9th Cir. 1969) (a section 2(a) case in which there were 4

The *only* way to avoid the difficulties and injustices inherent in the concept of "automatic damages" is to follow the path prescribed by Congress and require proof of the best reasonable estimate of the actual amount of lost net profits suffered by the individual claimant.* Had Congress intended to provide for automatic damages for price discrimination, it would have done so.**

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competitor-purchasers and single damages amounted to $8,540.60). *See also, Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, 150 F.2d 988, 990 (8th Cir. 1945) (an action under sections 2(d) and 2(e) in which single damages amounted to $1,010); *Grace* v. *E. J. Kozin Co.*, 538 F.2d 170, 172 (7th Cir. 1976) (a section 2(c) case in which single damages were $19,780.64 on the section 2(c) count).

* The situation of amicus Ricky Hasbrouck does not demonstrate any difficulty of proving actual antitrust injury. The District Court has not reached the issue of whether there was a failure of proof of injury. Rather, the District Court only ruled that it had given a clearly erroneous jury instruction when it stated that injury could be inferred from nothing more than the price difference. Cessna submits the District Judge's correction of his previous error in the instructions was eminently correct. See *Hasbrouck* v. *Texaco, Inc.*, 1980-2 Trade Cases (CCH) ¶63,343 (E.D. Wash. 1980).

** For example, see 49 U.S.C. §2 (repealed 1978) which provided for automatic damages. If Congress had intended to provide for direct damages it would have written similar damage provisions into the Robinson-Patman Act.

CONCLUSION

For the reasons set forth above, Cessna respectfully submits that the decision of the Fifth Circuit should be upheld with regard to the necessity of proof of an actual substantial lessening of competition and of the actual amount of antitrust damages, if any, suffered by the plaintiff as a result thereof.

Respectfully submitted,

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STATE OF ILLINOIS
COUNTY OF COOK } ss.

AFFIDAVIT OF SERVICE

Thomas Y. Davies, being first duly sworn, deposes and says:

1. That this affidavit is made pursuant to Rule 28.5(c) of the Supreme Court Rules;

2. That affiant is an attorney representing The Cessna Aircraft Corporation; and

3. That, in compliance with Rules 28.3 and 36.5 of the Supreme Court Rules, affiant caused three copies each of the attached MOTION BY THE CESSNA AIRCRAFT COMPANY FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF THE CESSNA AIRCRAFT COMPANY AS AMICUS CURIAE IN SUPPORT OF RESPONDENT, CHRYSLER MOTORS CORPORATION, to be served upon all parties required to be served: namely, Morris K. Sirote at Sirote, Permutt, Friend, Friedman, Held & Apolinski, P.A., 222 Arlington Avenue South, Birmingham, Alabama 35205, counsel for petitioner, J. Truett Payne, Inc.; J. Frederic Ingram at Thomas, Taliaferro, Forman, Burr & Murray, 1600 Bank for Savings Building, Birmingham, Alabama, 35203, counsel for respondent, Chrysler Motors Corporation; John T. Cusack, One First National Plaza, Suite 3300, Chicago, Illinois 60603, counsel for *amicus curiae* Vanco Beverage, Inc.; and Robert H. Whaley at Winston & Cashatt, Fifth Floor, Spokane & Eastern Building, Spokane, Washington 99201, counsel for *amicus curiae* Ricky Hasbrouck, et al., by causing said copies to be deposited in the United States mail, with first-class postage prepaid on December 29, 1980.

Further affiant says not.

_____
Thomas Y. Davies

Sworn to before me this
29 day of December, 1980.

_____

My commission expires